IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR.

JUDGMENT

1.S.B. Civil Revision Petition No.2/2005
Rajendra Kumar vs. Bhagwan Lal

2.S.B. Civil Revision Petition No.29/2005
Rajendra Kumar vs. Bhagwan Lal

Date : 13.11.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. Sandeep Shah, for the petitioner.

Mr. RS Mankad a/w Mr.D Kawadia, for the respondent.

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BY THE COURT :

REPORTABLE

Heard learned counsel for the parties.

There are two revision petitions filed by the petitioner/plaintiff against the respondent/defendant – (1) SB Civil Revision Petition No.2/2005 challenging the order dated 11.5.2004 whereby the trial court rejected the petitioner's application for review of the order dated 18.9.2003 by which the trial court set aside the ex-parte decree passed under Order 37 CPC on application filed by the respondent under Order 37 Rule 4 CPC and (2) SB Civil Revision Petition NO.29/2005 challenging the order dated 13.5.2004 by which the trial court granted unconditional

leave to defend to the same defendant in the same suit.

It will be worthwhile to mention few facts with respect to the controversy. It is alleged by the plaintiff that the defendant executed two agreements on 12.8.1991 whereby he agreed to pay Rs.1,50,000/- given by the plaintiff as per the break-up given below :

12.6.91	Rs.50,000/-
05.7.91	Rs.25,000/-
18.7.91	Rs.25,000/-
12.8.91	Rs.50,000/-
Total	Rs.1,50,000/-

As per the agreement, there was term of payment of interest also on the loan amount. In the agreement, it was provided that in case of default in payment on or before 21.2.1994, the defendant shall be liable to refund the entire amount with interest. It is alleged that the agreement was duly executed on the stamp papers and signed by both the parties and attested by the witnesses. As against the above amount, the defendant issued two post dated cheques in favour of the plaintiff bearing No.983369 dated 10.2.1994 and No.983370 dated 21.2.1994 for Rs.50,000/- and Rs.1,00,000/- respectively. Both the cheques were presented by the plaintiff in the bank but they were dishonoured with the endorsement of the bank “insufficient funds in the account of the defendant”. The plaintiff served notice under Section 138 of the Negotiable Instruments Act, 1881 (for short 'the NI Act') and

thereafter, filed two criminal complaints on not receiving the cheque amount from the defendant. In both the criminal cases, the defendant was convicted and the orders of conviction was upheld by this Court in SB Criminal Revision Petition Nos.530/1998 and 531/1998 (Bhagwan Lal vs. State of Rajasthan and another) decided by the judgment dated 9.9.1998 reported in 1999(1) WLC (Raj.) 264. However, it will be worthwhile to quote para no.13 of the said judgment here under :-

> "13. As a result of the above discussion, the impugned decision of the learned Addl. Civil Judge (J.D.) cum Judl. Magistrate No. 1 dated 29.8.97 confirmed by the appellant court of the Addl. Sessions Judge No. 1, Udaipur, vide its judgment dt. 18.7.98, is hereby upheld. However, I deem it appropriate to order only in respect of payment of fine that instead of paying the entire amount of Rs.1,50,000/-, which has been made realisable in both the cases from the petitioner by way of imposition of fine, he is directed to deposit to abovesaid amount in favour of respondent No. 2 in the court of learned Addl. Civil Judge (J.D.) cum Judl. Magistrate No. 1, Udaipur in Cr. Cases Nos. 48 and 49 of 1995 within a period of four weeks from the date of receipt of certified copy of the order and which in turn respondent No. 2 shall be entitled to withdraw, failing which the impugned order dated 29.8.97 passed by the trial court and the order dated 18.7.98 passed by the appellate court shall stand

executable forthwith. It is further directed that if this order is complied-with within the time as indicated above, the petitioner shall be at liberty to avail of the civil remedy in connection the civil suit pending between the parties before the competent court for such reliefs, if so advised in accordance with law. It is further directed that in case the petitioner complies-with this order by depositing the fine amount with the trial court within the stipulated time, he shall be released from the judicial custody forthwith. In the event of default, he shall undergo the remaining period of sentence as well as pay the fine as imposed by the courts below."

Apart from taking aforesaid legal course, the plaintiff also filed two suits for recovery of the cheque amount, in view of the fact that there were two agreements and this fact was taken note of by the High Court in its decision (supra). In the present civil suit no.321/2003, it is alleged that the suit was filed on 24.2.1997, summons were issued to the defendant for the date 30.5.1997. Notices were served much prior to 30.5.1997 and since the suit was under Order 37 CPC, therefore, within 10 days from the service of summons, the vakalatnama was submitted by the counsel for the defendant on 19.3.1997. It is said that the plaintiff submitted application and summons for judgment under Order 37 CPC on 12.8.1997 which were served on the defendant on 20.8.1997. The counsel put in appearance on behalf of the defendant on 30.9.1997 and sought time for

filing written statement which was granted to the defendant by the Court despite the fact that the suit was under Order 37 CPC. Three adjournments were sought and granted by the court below for filing written statement. Thereafter, nobody appeared on behalf of the defendant, therefore, the trial court granted ex-parte decree under Order 37 CPC on 1.12.1997. The plaintiff submitted execution petition to execute the decree dated 1.12.1997. In the execution petition, the decree holder submitted an application under Order 21 Rule 46 CPC for attachment of the defendant's property lying in the Government department. In the reply to the said application, the judgment debtor admitted that the notice of application under Order 21 Rule 46 CPC was served upon him on 3.9.2000, however, the advocate put in appearance in execution case on behalf of the judgment debtor on 19.11.2001. It is alleged by the defendant that he applied for copies of relevant documents as well as copies of judgment and order on 20.9.2002 (after two years from service of notice in execution) through his counsel and thereafter, the defendant submitted one application under Order 37 Rule 4 CPC on 30.11.2002 for setting aside of the ex-parte decree dated 1.12.1997 passed in the present case. The defendant's application filed under Order 37 Rule 4 CPC was allowed by the trial court vide order dated 18.9.2003. The plaintiff/petitioner submitted an application under Order 47 Rule 1 CPC for review of the order dated 18.9.2003. The petitioner's said application for review of the order dated 18.9.2003 was dismissed by the trial court vide order dated 11.5.2004. Therefore, the

plaintiff/petitioner preferred revision petition no.2/2005 to challenge the order dated 11.5.2004.

After setting aside the ex-parte decree, the trial court entertained the defendant's application filed under Order 37 Rule 3(5) CPC and after hearing both the parties allowed the defendant's application for grant of leave to defend vide order dated 13.5.2004. The trial court granted unconditional leave to defend the suit to the defendant inspite of the fact that there was condition in the order of the High court though passed in criminal revision petitions in the proceedings with respect to the same cheques under Section 138 of the NI Act. Therefore, the plaintiff/petitioner preferred another revision petition no.29/2005 to challenge the order granting leave to defend the suit unconditionally dated 13.5.2004.

It will be further worthwhile to mention here that in another suit filed for recovery of the amount, on the basis of the same set of facts and on the basis of another agreement between the same parties, in the plaintiff's suit, the trial court dismissed the application for setting aside the ex-parte decree dated 12.5.2004 (passed in civil original suit no.211/97 decided on 13.2.1998) against which the defendant preferred writ petition no.3476/2004 before this Court. The said writ petition was allowed by this Court by a brief order dated 14.7.2006, which reads as under :-

“Learned counsel for the petitioner submits that he is

> ready to pay Rs.1,00,000/- before the trial court. Since the petitioner is ready to pay the amount which would be close to decreetal amount which may be ultimately passed at the trial, this Court feels that ex-parte decree may be set aside provided the petitioner first deposits sum of Rs.1,00,000/-. In case the amount is not deposited the earlier order will take effect and it would be deemed that this order has not been passed. In case the deposit is made, the trial court will expedite the trial in accordance with law."

According to learned counsel for the petitioner, the trial court committed serious error of law in allowing the defendant's application filed under Order 37 Rule 4 CPC. It is submitted that the order dated 18.9.2003 is non-speaking order and the court below has not considered any of the fact of the case nor the arguments advanced by the parties. Not only this, the Court below has not decided any of the contentious issues in the order dated 18.9.2003 and merely held that in view of the arguments and facts available on the record and the circumstances, in opinion of the court, the application of the defendant deserves to be allowed. It is also submitted by learned counsel for the petitioner that the court below committed serious error of law in dismissing the petitioner's application filed under Order 47 Rule 1 CPC on the ground that no ground is made for review of the order dated 18.9.2003 despite the fact that all material as well as facts which have been referred in detail above, clearly shows that the defendant was not entitled to order of setting aside the ex-parte decree and

the order of setting aside ex-parte decree dated 18.9.2003 was no order in the eye of law.

Learned counsel for the petitioner further vehemently submitted that in the light of the facts mentioned above and the order passed by this Court in two criminal revision petitions of the defendant himself, referred to above, the trial court should not have entertained any of the application of the defendant, may it be for setting aside of the ex-parte decree or for grant of leave to defend because the defendant did not comply with the direction of this Court passed in said two criminal revision petitions by defendant himself. It is submitted that the defendant/respondent neither deposited the fine amount nor paid the principal amount. The defendant did not take benefit of indulgence of this Court shown in the order passed on the defendant's own criminal revision petitions. The defendant should have deposited the fine amount in the trial court but he did not deposit the amount, therefore in view of the final judgment passed against the defendant in the two criminal revision petitions, the defendant was not entitled to any of the order in his favour to defend the suit or decree.

Apart from above, according to learned counsel for the petitioner, the petitioner still give the concession that if the defendant deposits the entire suit amount before the trial court in consonance with the order passed by this Court in writ petition no.3476/2004 dated 14.7.2006, which has been passed in identical facts and circumstances involving identical issues with different cheque and

agreement as are involved in this case, then leave may be granted to the defendant to contest the suit but on condition of deposit of entire suit amount.

Learned counsel for the defendant/respondent vehemently submitted that it is true that the notice of application under Order 21 Rule 46 CPC for execution of the decree dated 1.12.1997 was served upon him on 3.9.2000 but his counsel assured him that he will take care of the proceedings and he need not to come again till he is called. Therefore, till 20.9.2002, he could not apply for the copy of relevant documents i.e. Judgment and decree of the court below passed on 1.12.1997 and other relevant documents and, therefore, he could not submit the application for setting aside of the ex-parte decree before 20.9.2002. It is also submitted that this Court passed order in criminal revision petitions of the defendant permitting him to contest the suit and that fact has been taken note of by the court below while granting leave to defend. It is also submitted that the civil court even in pursuance of the directions of this Court in criminal revision petitions bound to decide the application of the defendant filed under Order 37 Rule 4 CPC in accordance with law which the Court did. The defendant filed application under Order 37 Rule 3 CPC in accordance with law and the court below has rightly decided both the applications. It is also submitted that in the review petition, no ground was made out by the petitioner for recalling of the order dated 18.9.2003.

Learned counsel for the defendant/respondent further vehemently submitted that this Court allowed the defendant's writ petition no.3476/2004 challenging the order of the trial court refusing to set aside ex-parte decree whereas in the present case, the trial court itself not only set aside the ex-parte decree by the order dated 18.9.2003 but also dismissed the review petition filed by the petitioner for recalling of the order dated 18.9.2003 and thereafter, granted unconditional leave to defend to the defendant, therefore, this Court may not interfere in the order passed by the court below which has been passed after considering the facts of the case and in view o the fact that the respondent has shown plausible cause for grant of leave to defend.

I considered the submissions of the learned counsel for the parties and perused the facts which have been referred above in detail.

The facts may be recapitulated in short that there are two agreements alleged to have been executed by the same defendant and alleged to have been given cheques in pursuance of some contract between the parties. The cheques were presented for encashment but were dishonoured by the defendant's bank with the endorsement “insufficient funds”. In the proceedings under Section 138 of the NI Act, the defendant was convicted and conviction was upheld by the High Court by dismissing two criminal revision petitions preferred by the defendants. The High Court while deciding the criminal revision petitions passed the order and

relevant portion of the order has already been quoted in the preceding paras of this judgment. It appears that the High Court while dismissing the revision petitions have taken note of pending civil suits. The High Court after upholding the order of conviction for imposition of fine, ordered that instead of paying the entire amount of Rs.1,50,000/-, which has been made realisable in both the cases from the accused defendant by way of imposition of fine, he is directed to deposit above amount in favour of respondent No. 2 i.e. present plaintiff in the court of learned Addl. Civil Judge (J.D.) cum Judl. Magistrate No. 1, Udaipur in Criminal Cases Nos.48 and 49 of 1995 within a period of four weeks from the date of receipt of certified copy of the order. This Court also directed that the respondent No.2 (present plaintiff) shall be entitled to withdraw the said amount. This Court also ordered that in case, the accused will not comply with the order as above, the conviction order shall stand executable. It is not in dispute that the defendant did not deposit the fine amount also and he has undergone the sentence and remained behind bars in both the criminal cases.

Though the order of the court below dated 18.9.2003 deserves to be set aside merely on the ground that the said order is non-speaking order as by the said order, the trial court has not considered any of the facts of the case or considered the arguments advanced by the parties nor decided any of the issues raised and contested by the parties. It is also not clear whether both the parties brought to the notice of the court below the order of this

Court passed in defendant's criminal revision petitions (supra). Be it as it may be, from the order dated 18.9.2003, it is apparent that the order of High Court passed in the criminal revision petitions (supra) has not been considered. The review petition of the petitioner should have been allowed by the court below and the order dated 18.9.2003 should have been recalled but that also has not been done. But meanwhile, the defendant, in identical facts and circumstances in another civil suit no.211/97, has been allowed one opportunity to contest the suit but on depositing Rs.1,00,000/-, therefore, this Court to maintain consistency in the orders and in view of the concession of the plaintiff, is not inclined to set aside the order of the trial court dated 18.9.2003 as well as order dated 11.5.2004 but in the facts and circumstances, granting of unconditional leave to defend the suit to the defendant cannot be justified by any stretch of imagination because of the reason that before grant of leave by the trial court, the trial court has not considered the relevant facts except the allegation of the defendant that the alleged agreements and cheques are forged and signatures of the defendant have been obtained by the plaintiff on the said agreements and cheques by deceitful means and the suit of the plaintiff is barred by time. For these arguments, it appears from the facts of the case that the agreement alleged to have been executed on 12.8.1991 and the amount under the agreement was payable upto 21.2.1994. The cheques were also having the dates 12.2.1994 and 21.2.1994 which were dishonoured on 21.2.1994 and the suit has been filed

in the month of February, 1997 before the expiry of three years from the dishonour of the cheque. In view of the above, it is clear that the signatures on the agreements and cheques of the defendant were admitted by the defendant himself and once the signatures have been admitted, they have been obtained by deceitful means or any other coercive method or inducement, heavy burden lies on the defendant. At this stage, the signatures on the cheques and agreements are admitted and in view of the fact that the defendant was convicted by the competent criminal court, which independently is not very much relevant fact but in view of the fact that the defendant himself in identical facts and circumstances before this Court offered to deposit Rs.1,00,000/-, their appears to be no reason for not depositing the suit amount by the defendant to contest the present suit also filed under Order 37 CPC. The trial court while deciding the application under Order 37 Rule 3 CPC has not considered the relevant dates of the agreement, the last date upto which the payment could have been made by the defendant and the plaintiff's right to present the cheque in bank and did not compute the period of limitation from the date of dishonour of cheque. The trial court also did not consider the fact of admission of defendant that notice of application under Order 21 Rule 47 CPC was served on 3.9.2000 and he applied for the certified copies on 20.9.2002 and thereafter submitted application under Order 37 Rule 4 CPC on 30.11.2002. In the application for setting aside ex-parte decree passed under Order 37 CPC, special reasons are required to be shown by the defendant and as

per some of the judgments, he has also to show the reason for grant of leave to defend.

In these facts and circumstances, it will be appropriate to dismiss the revision petition no.2/2005 filed by the petitioner challenging the order dated 11.5.2004 (in view of the concession of the plaintiff) and partly allow the revision petition no.29/2005 challenging the order dated 13.5.2004.

Consequently, the revision petition no.2/2005 is dismissed, revision petition no.29/2005 is partly allowed, the order of setting aside the ex-parte decree dated 11.5.2004 passed in favour of the defendant shall remain and the order dated 13.5.2004 is set aside and it is ordered that the defendant shall be entitled to leave to defend in case, he deposits the entire suit amount within a period of two months from the date of receipt of certified copy of this order.

In case, the defendant fails to deposit the aforesaid amount within the stipulated time, the application for leave to defend shall stand rejected and the Court below may pass consequential decree.

However, in case the defendant deposits the aforesaid amount, the plaintiff shall be entitled to withdraw the same on furnishing bank guarantee of the said amount.

(PRAKASH TATIA), J.

S.Phophaliya